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ANALYSIS OF DOCTRINE OF MERGER OF ORDERS

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Introduction & Background

On 01.10.2021, the Division Bench of the Hon'ble Supreme Court of India ("**SC**") unanimously held 12(twelve) respondents guilty of contempt of its Order in a civil contempt petition being filed by the petitioners. [*V. Senthur and Another v. M. Vijayakumar, IAS, Secretary, Tamil Nadu Public Service Commission and Another,* 2021 SCC OnLine SC 846] The petition was filed against non-compliance of the SC's Order dated 22.01.2016 wherein the Special Leave Petition ("**SLP**") filed by the respondents against a judgment of the Division Bench of the Madras High Court ("**HC**") was dismissed. While dismissing the SLP, even though the Court upheld the Order of the HC that the seniority list should be drawn on the basis of merit list of selection and not on the basis of roster point, the respondents acted against this Order and published the revised seniority list on the basis of the roster point. On the other hand, the respondents argued that since the Order to the effect has been passed by the HC and whereas the SC merely dismissed the SLP filed against that Order, the doctrine of merger cannot be made applicable. Resultantly, since the doctrine of merger is not applicable in the case of SLP being dismissed, contempt cannot be said to be committed against SC. The SC inter alia held that though the doctrine of merger is not applicable in case of dismissal of an SLP with reason, but the law laid down or declared there is applicable and binding on the parties and Court below by virtue of Article 141 of the Constitution.

Understanding Doctrine of Merger of Orders

A. *Origin and Basis*

The Doctrine of Merger is a common law doctrine that is rooted in the idea of maintaining the decorum of hierarchy of Courts and Tribunals. The doctrine is based on the reasoning that there cannot be, at one relevant point of time, more than one operative Order governing the same subject matter.

B. *Meaning*

The Doctrine of Merger can be best understood by referring to the decision of the SC in *Kunhayammed and Others v. State of Kerala and Another,* (2000) 6 SCC 359, Para 43 - "*Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of the law.*"

C. Earlier Judicial Decisions

Way back in the year 1953, the High Court of Bombay in *CIT v. Tejaji Farasram Kharawalla,* 1953 SCC OnLine Bom 28 observed that:
"…It is a well-established principle of law that when an appeal is provided from a decision of a tribunal and the appeal court after hearing the appeal passes an order, the order of the original court ceases to exist and is merged in the order of the appeal court, and although the appeal court may merely confirm the order of the trial court, the order that stands and is operative is not the order of the trial court but the

In *Gojer Bros. (P) Ltd. v. Ratan Lal Singh,* (1974) 2 SCC 453,the SC reiterated that *"insofar as the doctrine of merger was concerned there could be no distinction in terms of application of the doctrine of merger between an appellate judgment simpliciter dismissing an appeal, and an appellate judgment modifying or reversing the decree of the lower court."*

D. Pre-conditions

As laid down in *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*, (1969) 2 SCC 74:

1. The jurisdiction exercised should have been appellate or revisional jurisdiction.
2. Such jurisdiction must necessarily have been exercised after issuance of notice.
3. It must have followed a full hearing in presence of both parties.

Inapplicability

1. Where the scope of appeal/revision is narrower than that of the original proceeding.
2. Where the power vested in the Court designated to hear such appeal/revision is limited.
3. Where the Order itself has been secured by means of fraud.

In the case of Special Leave Petitions

The SC on a number of occasions has held that a non-speaking Order of dismissal of special leave petition cannot reasonably lead one to the conclusion that it is a tacit approval of the Order/Decree/Judgment appealed against. A similar view was put forth by the SC in *V.M. Salgaocar & Bros. (P) Ltd. v. CIT*, (2000) 5 SCC 373 where the Court held that in dismissing a Special Leave Petition the Court does not express any opinion on the Order from which such appeal is itself sought.

The SC's decision in *Kunhayammed and Others v. State of Kerala and Another,* (2000) 6 SCC 359 is so far the most significant decision in this regard:

"(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation."

The SC in *Vijayakumar case* reiterated the law laid down in *Kunyammed*.

Conclusion

The Doctrine of Merger stems from necessity, that is, the absence of an established doctrine to ascertain which one of several successive Orders must be deemed as final. The Doctrine of Merger more than adequately fills this void by stipulating that it would be the Order of the appellate or revisional Court that would be final. The SC, in the case of Vijaykumar, has just reiterated a well settled principle of law, thereby, re-affirming its position on the merger of Orders in the case of dismissal of SLPs.